95-1578

Supreme Court, U.S.
FILED
MAR 18 1996
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

JACK DAVID KELLY,
"PRO SE,"

Petitioner,

versus

ALBERT PENSON, in his individual capacity
and as a partner in the Law Firm of
HILTON, HILTON, KOLK AND PENSON, P.A.,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Florida

PETITION FOR WRIT OF CERTIORARI

JACK DAVID KELLY, Pro SE
3331 Summit Blvd., #87
Pensacola, FL 32503
(904) 438-4785
Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the lower courts declared invalid the provisions of the state of Florida's Constitution.

Article 1, Section 21 – "The courts shall be open to every person for redress of injury and justice shall be administered without sale, denial or delay."

Based on the question above was the provisions of the state of Florida's Constitution recognized and carried out insuring the right of the petitioner to a fair impartial unbiased trial in compliance with the Florida Constitution's rights and in compliance with the rights of the Florida Statutes, and in compliance with the provision of:

Principle 255 from the Fourteenth Amendment which provides "No state shall deny to any person who lives within its jurisdiction the equal protection of the laws."

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JURISDICTION

The date of the judgment or order sought to be reviewed was entered December 20, 1995.

Pursuant to 28 U.S.C. and Rule 10.1 – The Supreme Court of the United States has discretionary power to review final orders of a state's highest court of last resort.

Market Street R. Co. v. Railroad Commission, 324 U.S. 548, 551 (1945).

This court has held that to be reviewable, the state court judgment "must be final," it must be the final word of the final court.

This Petition for Writ of Certiorari is timely filed and therefore this court does have jurisdiction pursuant to Rule 13 of the Rules of the United States Supreme Court.

Jurisdiction is established by the provision of the Florida Constitution, Article 1, Section 21 – "The courts shall be open to every person for redress of injury and justice shall be administered without sale, denial or delay."

Principle 255 from the Fourteenth Amendment which provides "No state shall deny to any person who lives within its jurisdiction the equal protection of the laws."

The right to a fair impartial unbiased trial in compliance with the Florida Constitution's rights, in compliance with the provisions and rights of the Florida Statutes and in compliance with the provisions of the Constitution of the United States of America.

STATEMENT OF THE CASE

The contract between Jack David Kelly and Albert Penson in his individual capacity and as a partner in the Law Firm of Hilton, Hilton, Kolk and Penson, P.A. was and is a binding contract as a matter of law and equity and not subject to repudiation by either party until or unless the performance of condition failed.

Such failure of this charged statement's terms, time, conditions and covenants occurred later in time from the date of the contract. The failure of these charged terms, time, conditions and covenant of the said contract invalidated the contract agreement of March 27, 1990.

REASONS FOR GRANTING THE WRIT

Whether the lower courts declared invalid the provisions of the state of Florida's Constitution.

Article 1, Section 21 – "The courts shall be open to every person for redress of injury and justice shall be administered without sale, denial or delay."

Based on the question above was the provisions of the state of Florida's Constitution recognized and carried out insuring the right of the petitioner to a fair impartial unbiased trial in compliance with the Florida Constitution's rights and in compliance with the rights of the Florida Statutes, and in compliance with the provisions of:

Principle 255 from the Fourteenth Amendment which provides "No state shall deny to any person who lives within its jurisdiction the equal protection of the laws."

Obstruction of justice is applicable in this instant case tolling the statute of limitations.

Concealment of the truth is a violation of a rule of equity as well as the law where either the suppression of the factual truth *or the suggestion of what is false can be proved in a fact material to the contract, the party injured may have relief against the contract.* Suppression of the truth is an expression of what is false; and therefore, obstruction of justice and the act by which one or more persons attempt to prevent, or do prevent the execution of lawful process, which is a specific illegal act of the instant case.

Toledo Newspaper Co. v. U.S., 247 U.S. 402, 38 S. Ct. 560, 564, 62 L.Ed. 1186.

18 U.S.C.A. § 1501.

Model Penal Code § 242.1.

1. *Violation of the Terms of the Contract* – "If we are only to pursue the declaratory judgment action or similar actions to invalidate the merger and to have the title to the property effectively identified, I estimate that our fees would range from $5,000 to $8,000 assuming we encountered slight to moderate opposition. Of course, the stronger the opposition the more likely your fees will exceed the range identified above." Paragraph III of Exhibit identified as Exhibit "A" hereto attached and made a part hereof.

Deliberate delay of one year and eight months constituting obstruction of justice, legal malpractice and breach of contract of any reasonable performance of said contract to hinder and delay by dishonesty and moral wrong of performance of said agreement of March 27, 1990, of

case now known as No. 95-882 in the Supreme Court of the United States, October Term 1995.

2. *Violation of Time Requirement of the Contract* – "Pursuant to our discussion today, we are willing to proceed with this matter, as outlined above, upon an initial deposit of $1,000 and the remainder of the retainer ($4,000) to be deposited on or before April 20, 1990. If you would like us to proceed, please execute this letter in the space provided and return it to my office at your earliest convenience." (This statement is contained in paragraph V of Exhibit "A".)

As said above in Item 1 the first hearing was only a hearing on venue which was prolonged until one year and eight months which was an act of deliberate delay, consisting of obstruction of justice from date of contract, provision starting upon signing of March 27, 1990.

3. *Contract Violation of Promise* – A covenant to proceed thereby violating the plaintiff's constitutional right of Article 1, Section 21 – "The courts shall be open to every person for redress of injury and justice shall be administered without sale, denial or delay."

Therefore the performance of the condition of the contract to proceed at the signing and initial deposit of $1,000 and the remainder of the retainer ($4,000) to be deposited on or before April 10, 1990, did not happen until one year and eight months later.

Supported by documentary proof of obstruction of justice and violation of the provision of Article 1, Section 21.

In addition, deliberate obstruction of justice, necessary before and after the fact, stifling, suppressing, controlling, relevant, material facts, concealment of a felony cognizable by a court of the United States and does not make known the same to some judge or other person in civil authority under the United States.

Samuel Goldwyn, Inc. v. United Artists Corp., 113 F.2d 703, 707 (C.C.A.).

18 U.S.C. § 4.

U.S. v. Ciambrone, 750 P.2d 1416, 1417 (C.A. Nev.).

The defendant Albert Penson had full knowledge that the evidence of controlling, relevant material facts was called for in an interrelated case of which he was counselor and this cause of action was a breach of contract and legal malpractice.

United States v. Perlstein, 126 F.2d 799.

Commonwealth v. Russo, 177 Pa. Super. 470, 111 A.2d 359.

18 U.S.C.A. § 1506, 1512.

United States v. Perlstein, 126 F.2d 789, 798 (C.C.A. N.J.).

CONCLUSION

Wherefore the petitioner, a citizen of the United States of America asks this, the Supreme Court of the United States, to exercise its supervisory powers and reverse the judgment of the lower courts and remand to

trial for further proceeding to declare the sense of the law and not judgment.

Article III Jurisdiction of the Federal Court, Principle 168 from Article III.2.1.

It involves the petitioner, a citizen's fundamental rights of the Constitution of the State of Florida and the Constitution of the United States of America of law and equity and the contract's right of law and equity. Therefore, the judgments of the lower courts of Florida were without authority, color of law, biased and certainly prejudicial.

The Florida state court of last resort has departed from the accepted uniform constitutional rights of judicial proceeding and sanctioned such departure by the lower courts of Florida, wherefore this Writ of Certiorari should be allowed, the judgments should be reversed and all interrelated relevant cases listed below consolidated and remanded for trial with this court of the United States exercising its supervisory and jurisdictional powers for the constitutional rights of the state of Florida, and the United States of America, the Florida Statutes and the rights of truth.

Interrelated Cases to this instant case:

No. 79-1862-CA-01, Div. "E", Pensacola Loan and Savings, a Florida Industrial and Savings Bank vs. Williams, Emory O., ET UX, ET AL. vs. Tree Farm Development Corporation.

No. 95-882, Maple Leaf Development Corporation, Jack David Kelly, Individually as a person with Equity and Legal Title as the Original Sole Owner of Maple Leaf

Development Corporation and as its President and Chairman, Pro Se vs. Tree Farm Development Corporation; Emory O. Williams, Jr.; The Estate of George G. Phillips, Jr.; E.D. Bob Pierce; and the Estate of Abraham L. Pierce and all cases consolidated therein.

Sincerely,

/s/ Jack David Kelly

JACK DAVID KELLY, Pro SE
3331 Summit Blvd., #87
Pensacola, FL 32503
(904) 438-4785

Exhibit "A"

Hilton, Hilton, Kolk & Penson
P.O. Box 1327
701 E. Tennessee Street
At Franklin Blvd.
Tallahassee, FL 32308
Tel. (904)561-8000
FAX (904)561-8030

March 27, 1990

Mr. Jack David Kelly
3331 Summit Boulevard
Jamestown Apartments #87
Pensacola, Florida 32503

Dear Mr. Kelly:

I. This letter follows our meeting earlier today. I appreciate the opportunity to meet with you and discuss your potential cause of action. The documents you provided appear to demonstrate that you have a sufficient factual basis upon which to proceed. Before filing any actions with the court, we would have to investigate the matter further and would have to examine the time frames in which these matters occurred to make sure that you are able to bring an action in 1990 for matters that arose between 1971 and 1980.

II. As we discussed, our fee for handling this matter would be based on an hourly rate of $125 per hour plus costs. The costs would include such items as filing fees, service of process fees, court reporter fees, photocopies, postage, long distance charges and any other expenses related to the handling of this matter.

III. If we are only to pursue the declaratory judgment action or similar actions to invalidate the merger and to have the title to the property effectively identified, I estimate that our fees would range from $5,000 to $8,000 assuming we encountered slight to moderate opposition. Of course, the stronger the opposition the more likely your fees will exceed the range identified above.

IV. If you would like this firm to represent you, then we will need you to deposit $5,000 to be held in trust, which we will bill against at the stated hourly rate. You will receive a bill every month showing the fees and costs incurred and the balance remaining in trust. If we exceed the $5,000 amount, then we would expect you to pay each month's costs and expenses as they are incurred.

V. Pursuant to our discussion today, we are willing to proceed with this matter, as outlined above, upon an initial deposit of $1,000 and the remainder of the retainer ($4,000) to be deposited on or before April 20, 1990. If you would like us to proceed, please execute this letter in the space provided and return it to my office at your earliest convenience.

I look forward to working with you if you so desire.

Sincerely,

/s/ Albert C. Penson
Albert C. Penson
Hilton, Hilton, Kolk & Penson

ACP/sfe

I HEREBY ACKNOWLEDGE and accept the fee arrangement outlined in this letter.

Date: 3/27/90 /s/ Jack David Kelly
Jack David Kelly

95-1578

Supreme Court, U.S.
FILED
MAR 18 1996
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

JACK DAVID KELLY, "PRO SE,"

Petitioner,

versus

ALBERT PENSON, in his individual capacity and as a partner in the Law Firm of HILTON, HILTON, KOLK AND PENSON, P.A.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Florida

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

JACK DAVID KELLY, Pro Se
3331 Summit Blvd., #87
Pensacola, FL 32503
(904) 438-4785
Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

Exhibit "A"

SUPREME COURT OF FLORIDA

Wednesday, December 20, 1995

JACK DAVID KELLY Appellant/Petitioner, V. ALBERT PENSON, ETC., Appellee/Respondent.	**	CASE NO. 87, 39 DISTRICT COURT OF APPEAL, 1ST DIST. NO. 94-4303

It appearing to the Court that is is without jurisdiction, the Petition for Review is hereby dismissed and no motion for rehearing will be entertained by the Court.

It appearing to the Court that the District Court of Appeal, First District, did not declare *invalid* a State Statute or a provision of the State Constitution, and that, therefore, it is without jurisdiction, this appeal is hereby dismissed subject to reinstatement if jurisdiction is established on proper motion *filed* within fifteen (15) days from the date of this order. See Article V, Section 3(b)(1), Florida Constitution.

A True Copy
TEST:
/s/ Sid J. White
Sid J. White
Clerk Supreme Circuit

H

cc: Hon. Jon S. Wheeler, Clerk
Hon. Dave Lang, Clerk
Hon. F.E. Steinmeyer, Judge
Mr. Jack David Kelly
Mr. Francis H. Sheppard
Ms. Lisa M. Appelo

State of Florida, County of Leon
I HEREBY CERTIFY that the above and foregoing is a true and correct copy of an instrument filed in the official records of Leon County, Florida.

Witness my hand and seal of office this 22 day of Mar. 1996.
DAVE LANGE – Clerk of Circuit Court
[SEAL] By /s/ Shawn Dinker, Jr.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JACK D. KELLY,

Appellant,

VS.

ALBERT PENSON, in his individual capacity and as a Partner in the Law Firm of Hilton, Hilton, Kolk & Penson, P.A.,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 94-4303

Opinion filed October 10, 1995.

An appeal from the circuit court for Leon County.

Jack David Kelly, Pro Se.

Sherry Grant Hall of Hall & Runnels, P.A., Destin, Attorney for Appellant.

Lisa M. Appelo of Rumberger, Kirk & Caldwell, Tallahassee, and Francis H. Sheppard of Rumberger, Kirk & Caldwell, Orlando, Attorneys for Appellee.

PER CURIAM.

We affirm the dismissal of appellant's second amended complaint, finding no error by the trial court in its determination that appellant failed to file his suit within the two-year statute of limitations period § 95.11(4), Fla Stat.

BOOTH, JOANOS and BENTON, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JACK D. KELLY

Appellant,

CASE NO. 94-4303

VS.

ALBERT PENSON,
in his individual capacity
and as a Partner in the
Law Firm of Hilton,
Hilton, Kolk & Penson,
P.A.,

Appellee.

ORDER

Appellant's counsel's ore tenus motion to withdraw as counsel is hereby granted.

By order of the Court dated this 10th day of October, 1995.

A TRUE COPY
ATTEST: [SEAL]
/s/ Jon S. Wheeler
JON S. WHEELER, CLERK

By: /s/ Judy Tehan
Deputy Clerk

Copies:
Jack D. Kelly
Lisa Appello
Sherry Grant Hall
Francis H. Sheppard

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399
Telephone No. (904) 488-6151

April 18, 1995

CASE NO: 94-04303

L. T. CASE NO. 93-3117

JACK DAVID KELLY V. ALBERT PENSON, in his Individual capacity, etc.

Appellant(s), Appellee(s)

BY THE ORDER OF THE COURT:

Counsel for appellant' motion to withdraw, filed April 3, 1995 is denied without prejudice to the filing of an amended motion that complies with Florida Rule of Appellate Procedure 9.440(b).

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

[SEAL]

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK
By: /s/ Judy Tehan
Deputy Clerk

Copies:
Jack D. Kelly
Lisa Appello
Dave Lang
Sherry Grant Hall
Francis H. Sheppard

In Computer SLC

State of Florida, County of Leon

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of an instrument filed in the official records of Leon County, Florida.

Witness my hand and seal of office this 22 day of Mar. 1996.

DAVE LANG - Clerk of Circuit Court

[SEAL] BY /s/ Shawn Dinker, Jr.

DISTRICT COURT OF APPEAL, FIRST DISTRICT
Tallahassee, Florida 32399
Telephone No. (904) 488-6151

March 29, 1995

CASE NO: 94-04303

L. T. CASE NO. 93-3117

JACK DAVID KELLY V. ALBERT PENSON, in his Individual capacity, etc.

Appellant(s), Appellee(s)

BY THE ORDER OF THE COURT:

Appellee's motion for extension of time to serve answer brief, filed on March 23, 1995, is granted. Time for service of the answer brief is extended to April 27, 1995.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

[SEAL]

/s/ Jon S. Wheeler
JON S. WHEELER, CLERK
By: /s/ Judy Tehan
Deputy Clerk

Copies:
Jack D. Kelly
Lisa Appello
Dave Lang
Sherry Grant Hall
Francis H. Sheppard

In Computer SLC

State of Florida, County of Leon

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of an instrument filed in the official records of Leon County, Florida.

Witness my hand and seal of office this 22 day of Mar. 1996.

DAVE LANG – Clerk of Circuit Court

[SEAL] BY /s/ Shawn Dinker, Jr.

IN THE CIRCUIT COURT
IN AND FOR LEON COUNTY, FLORIDA

JACK DAVID KELLY,

Plaintiff,

CASE NO. 93-3117

vs.

ALBERT PENSON, in his individual capacity and as a Partner is the Law Firm of Hilton, Hilton, Kolk & Penson, P.A.,

Defendant.
_____/

ORDER ON PLAINTIFF'S MOTION FOR CONTINUANCE AND DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

THIS CAUSE having come before this Count on Plaintiff's Motion of Continuance served November 14, 1994, and Defendant's Motion to Dismiss Second Amended Complaint served May 12, 1994, and the Court having heard argument and being fully advised in the premises

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Continuance is denied; and

2. The Defendant's Motion to Dismiss the Second Amended Complaint is granted and the Plaintiff's Second Amended Complaint is dismissed with prejudice.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida this 23rd day of November, 1994.

/s/ F. E. Steinmeyer, III
Circuit Judge

Copies to:
Ms. Lisa M. Appelo
Mr. Francis H. Sheppard
Mr. Jack David Kelly

State of Florida, County of Leon

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of an instrument filed in the official records of Leon County, Florida.
Witness my hand and seal of office this 22 day of Mar, 1996.
DAVE LANG – Clerk of Circuit Court
[SEAL] By /s/ Shawn Dinker, Jr.

FILED 94 NOV 29 PM 2:39
DAVE LANG
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

IN THE CIRCUIT COURT
IN AND FOR LEON COUNTY, FLORIDA

JACK DAVID KELLY

.. Plaintiff,

vs.

ALBERT PENSON, in his individual capacity and as a Partner in the Law Firm of Hilton, Hilton, Kolk & Penson, P.A

Defendant.

_____/

CASE NO.: 93-3117
FILED 94 MAR 24 PM 3:38
DAVE LANG - CLERK
CIRCUIT COURT
LEON COUNTY, FLORIDA

IN COMPUTER - JW

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE, having come to be heard on Defendant's Motion to Dismiss Amended Complaint and the Court having reviewed the pleadings, having heard argument, and being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Motion to Dismiss is granted. Plaintiff shall have 30 days in which to file an amended complaint and Defendant shall have 20 days in which to respond to said amended complaint.

DONE AND ORDERED this 24 day of March, 1994, in Chambers at Tallahassee, Leon County, Florida.

/s/ _____
Circuit Judge

Copies to:
Ms. Lisa M. Appelo
Mr. Francis H. Sheppard
Mr. Jack David Kelly

State of Florida,
County of Leon
I HEREBY CERTIFY that the above and foregoing is a true and Correct copy of an instrument filed In the official records of Leon County, Florida.
Witness my hand and seal of office
This 22 day of Mar, 1996.
DAVID LANG – Clerk of Circuit Court
[SEAL]
By /s/ Shawn Dinker, Jr.

IN THE CIRCUIT COURT, IN THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

CASE NO: 93-3117

JACK DAVID KELLY,
Plaintiff,

vs.

ALBERT PENSON,
Defendant.

_____/

FILED 93 DEC 20 AM 10:02
DAVE LANG - CLERK
CIRCUIT COURT
LEON COUNTY, FLORIDA

IN COMPUTER - JW

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE, having come to be heard on Defendant's Motion to Dismiss and the court having reviewed the pleadings, having heard argument, and being otherwise advised in the premises, it is hereby ORDERED AND ADJUDGED that the Motion to Dismiss is granted. Plaintiff shall have 30 days in which to file an amended complaint.

DONE AND ORDERED this 20 day of December 1993, in Chambers at Tallahassee, Leon County, Florida.

/s/ _____
CIRCUIT JUDGE

Copies to:

Francis H. Sheppard, Esquire
Jack David Kelly

State of Florida,
County of Leon
I HEREBY CERTIFY that the above and foregoing is a true and Correct copy of an instrument filed In the official records of Leon County, Florida.
Witness my hand and seal of office
This 22 day of Mar, 1996.
DAVE LANG

[SEAL]

Clerk of Circuit Court
By /s/ Shawn Dinker, Jr.

Supreme Court, U.S.
FILED
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CLERK

No. 95-1578

In The

Supreme Court of the United States

October Term, 1995

JACK DAVID KELLY,

Petitioner,

versus

ALBERT PENSON, in his individual capacity and as a partner in the Law Firm of HILTON, HILTON, KOLK AND PENSON, P.A.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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Signature Plaza, Suite 300
201 South Orange Avenue
Orlando, FL 32801
(407) 872-7300

Counsel of Record for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF INTERESTED PARTIES

The petitioner is Jack David Kelly.

The respondents are Albert Penson and Hilton, Hilton, Kolk & Penson, P.A. Francis H. Sheppard and Lisa M. Appelo, of Rumberger, Kirk & Caldwell, P.A., are counsel for respondents.

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THIS COURT HAS NO JURISDICTION UNDER 28 U.S.C. § 1257(a) TO CONSIDER THE PETITIONER'S ARGUMENT 5

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PRELIMINARY STATEMENT

The record on appeal will be cited as "R. ___." The appendix served with Respondent's brief in opposition will be cited as "App. ___."

CITATIONS TO OPINIONS AND ORDERS ENTERED

Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the Florida District Court of Appeal, First District. The First District Court's opinion is reported at 661 So. 2d 1238 (Fla. Dist. Ct. App. 1995), *rev. dismissed* 666 So. 2d 143 (Fla. 1995) (attached at Appendix B and C, respectively). The Supreme Court of Florida dismissed the petition for certiorari review, reported at 666 So. 2d 143 (Fla. 1995) (attached at Appendix "D.").

STATEMENT OF JURISDICTION

Under 28 U.S.C. § 1257(a), this Court cannot exercise jurisdiction over this case because no federal question has been raised by the petition. No federal question was raised below nor considered by the state courts and Petitioner's vague reference to the 14th Amendment in his Questions Presented is insufficient to trigger jurisdiction under § 1257(a).

STATUTES INVOLVED IN THE CASE

28 U.S.C. § 1257:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Fla. Stat. Ch. 95.11(4)(a) (1989):

> **Limitations other than for the recovery of real property.** – Actions other than for recovery of real property shall be commenced as follows:
>
> **(4) Within two years. –**
>
> (a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

STATEMENT OF THE CASE

Petitioner's Statement of the Case does not set forth the procedural and substantive nature of this case.

This case concerns the application of Florida's statute of limitations to a legal malpractice action. On July 30, 1993, Petitioner filed a complaint against Respondents, attempting to allege a legal malpractice action. [R. 1-7] The trial court dismissed both the complaint and amended complaint without prejudice granting leave to amend. [R. 11-12; 37] The Petitioner filed a second amended complaint for legal malpractice, alleging that respondent had breached a contract by "lack of timely representation" and "lack of proper representation." [R. 74-77] Attached as an exhibit to the second amended complaint was a June 4, 1991 letter stating in part:

> I feel that I have not been properly represented in the past by you. Therefore, in good faith and honesty I cannot consent to your request to withdraw until the facts of your representation and the return of the money that has been paid to you and costs and loss of money incurred as a result of your lack of *proper* and *timely* representation.

[R. 74-77] Respondent moved to dismiss the second amended complaint with prejudice on grounds that it appeared from the face of the complaint that any action for legal malpractice was barred by the two-year statute of limitations set forth in § 95.11(4)(a), Florida Statutes (1989). [R. 78-81] The trial court dismissed the second amended complaint with prejudice. [App. A]

On appeal, the District Court of Appeal of Florida for the First District per curiam affirmed dismissal of the second amended complaint. [App. B] The written opinion states that the Court found "no error by the trial court in its determination that [Petitioner] failed to file his suit within the two-year statute of limitations period." [App. B] The written opinion from the First District Court of Appeal references only a state statute, § 95.11(4), and does not cite to any federal statute or provision. [App. B] The Petitioner moved for reinstatement, rehearing, clarification and certification which was denied. [App. C] Petitioner then filed a Petition for Review in the Supreme Court of Florida. The Florida Supreme Court dismissed the Petition for Review on grounds that it lacked jurisdiction since the First District Court of Appeal had not declared invalid a state statute or provision of the state constitution. [App. D]

Significantly, it should be noted that at no point in the state proceedings did the Petitioner ever raise a federal question that could be or actually was considered or decided by a Florida state court. Moreover, contrary to the implication in Petitioner's Questions Presented, at no time in this action did any Florida court address the validity of a provision of the Florida Constitution.

REASONS FOR DENYING THE WRIT

THIS COURT HAS NO JURISDICTION UNDER 28 U.S.C. § 1257(a) TO CONSIDER THE PETITIONER'S ARGUMENTS

This case involves no federal question whatsoever. The Petitioner seeks review of a state court judgment. Under 28 U.S.C. § 1257(a), this Court may only grant certiorari for cases involving questions concerning the validity of a treaty or United States statute; the validity of a state statute as being repugnant to the Constitution, treaties or laws of the United States; or a title, right, privilege or immunity specially set up or claimed under the Constitution, treaties or United States statutes. This case is a hundred miles from any of these issues.

Rather, this case involves purely a matter of state law. This Court has held that there is no authority to review state determinations of purely state law. *Int'l Longshoremen's Ass'n, AFL-CIO, v. Davis*, 476 U.S. 380, 387 (1986); *see also Webb v. Webb*, 451 U.S. 493, 494 (1981). The instant case concerns application of a Florida statute of limitation to a tort action brought in a Florida court. State statutes limiting the time and manner of suits are questions for state courts, whose judgments are not reviewable by the Supreme Court, unless the statute affects a right claimed under the United States Constitution. *De Saussure v. Gaillard*, 127 U.S. 216 (1888). Thus, the Florida courts' application of a Florida statute of limitation is not reviewable under § 1257.

Not only does this case not involve a federal question, at no time did the Petitioner raise a federal question below. Certiorari jurisdiction in the Supreme Court to

review judgments rendered by the highest state court requires both that a federal question be raised and decided in the state court below. *Illinois v. Gates*, 462 U.S. 213, 218 (1983). If both requirements do not appear in the record, there can be no appellate jurisdiction. *Id.* at 218; *Webb*, 451 U.S. at 496-97.

A review of the record reveals that the Petitioner never raised a federal question in the trial court or on appeal to either the Florida First District Court of Appeal or the Supreme Court of Florida. Respondents' motion to dismiss the second amended complaint did not raise any federal issue and the trial court, in dismissing the second amended complaint, did not rule on any federal issues. Moreover, the First District Court of Appeal's opinion states that dismissal of the second amended complaint was affirmed based on Florida's statute of limitations. This Court has held that when the highest state court has not passed upon a federal question, it will be assumed it was because no federal question was presented to the state court, unless the aggrieved party can affirmatively show otherwise. *Street v. New York*, 394 U.S. 576, 582 (1969); *see also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). Petitioner has failed to show in his petition any point in the proceedings below in which he ever raised a federal question. *See* Sup. Ct. R. 14.1(g)(i).

Indeed, the Question Presented by Petitioner raises a question of state law: "whether the lower courts declared invalid the provisions of the state of Florida's Constitution" and then cites Article I, Section 21 of the Florida Constitution. At the outset, the record in this case makes clear that no Florida court ever considered the validity of a state statute or provision of the Florida Constitution;

the courts merely applied a state statute of limitation in dismissing the case. In any event, it has been consistently held that whether a state statute violates a state constitution is a local question and does not provide jurisdiction for Supreme Court review. *Payton v. New York*, 445 U.S. 573 (1980); *Southwestern Oil Co. v. Texas*, 217 U.S. 111 (1910).

The Questions Presented goes on to state:

> Based on the question above was the provisions [sic] of the state of Florida's Constitution recognized and carried out insuring the right of the petitioner to a fair impartial unbiased trial in compliance with the Florida Constitution's rights and in compliance with the rights of the Florida Statutes, and in compliance with the provision of:
>
> Principle 255 from the Fourteenth Amendment which provides "No state shall deny to any person who lives within its jurisdiction the equal protection of the laws."

Petitioner's generic reference to the 14th Amendment for the first time in the petition for writ of certiorari is insufficient to preserve a federal question for review. *See Taylor v. Illinois*, 484 U.S. 400, 406-407 (1988). Even if the First District Court of Appeal had erroneously construed or applied Florida's statute of limitation in this case (which it did not), it does not amount to a violation of the 14th Amendment so as to become reviewable by the Supreme Court. *Neblett v. Carpenter*, 305 U.S. 297, 302 (1938).

Because the petition for writ of certiorari fails to raise a federal question and because the Petitioner at no time

in the state court proceedings pressed a federal question that was ever passed upon by the court, there can be no certiorari jurisdiction for this case under 28 U.S.C. § 1257(a).

CONCLUSION

Because this Court lacks jurisdiction under 28 U.S.C. § 1257(a), the petition for writ of certiorari should be denied.

Respectfully submitted,

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(904) 222-6550

Counsel of Record for Respondents

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT
IN AND FOR LEON COUNTY, FLORIDA

JACK DAVID KELLY,

Plaintiff,

vs.

CASE NO.:
93-3117

ALBERT PENSON, in his individual capacity and as a Partner in the Law Firm of Hilton, Hilton, Kolk & Penson, P.A.

Defendant.

_____/

ORDER ON PLAINTIFF'S MOTION FOR CONTINUANCE AND DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

THIS CAUSE having come before this Court on Plaintiff's Motion for Continuance served November 14, 1994, and Defendant's Motion to Dismiss Second Amended Complaint served May 12, 1994 and the Court having heard argument and being fully advised in the premises

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Plaintiff's Motion for Continuance is denied; and

2. The Defendant's Motion to Dismiss the Second Amended Complaint is granted and the Plaintiff's Second Amended Complaint is dismissed with prejudice.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 23 day of November, 1994.

/s/ F. E. Steinmeyer, III
F. E. Steinmeyer, III
Circuit Judge

Copies to:

Ms. Lisa M. Appelo
Mr. Francis H. Sheppard
Mr. Jack David Kelly

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JACK D. KELLY,

Appellant,

vs.

ALBERT PENSON, in his individual capacity and as a Partner in the Law Firm of Hilton, Hilton, Kolk & Penson, P.A.,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 94-4303

Opinion filed October 10, 1995.

An appeal from the circuit court for Leon County. F. E. Steinmeyer, III, Judge.

Jack David Kelly, Pro Se.

Sherry Grant Hall of Hall & Runnels, P.A., Destin, Attorney for Appellant.

Lisa M. Appelo of Rumberger, Kirk & Caldwell, Tallahassee, and Francis H. Sheppard of Rumberger, Kirk & Caldwell, Orlando, Attorneys for Appellee.

PER CURIAM.

We affirm the dismissal of appellant's second amended complaint, finding no error by the trial court in its determination that appellant failed to file his suit within the two-year statute of limitations period. § 95.11(4), Fla. Stat. BOOTH, JOANOS and BENTON, JJ., CONCUR.

APPENDIX C

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

November 21, 1995

CASE NO: 94-04303

L.T. CASE NO. 93-3117

Jack David Kelly v. Albert Penson, in his individual capacity etc.

Appellant(s), Appellee(s).

BY ORDER OF THE COURT:

Motion for reinstatement, rehearing, clarification and certification, filed October 23, 1995, is DENIED.

Appellant's request for oral argument, filed October 26, 1995, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

JON S. WHEELER, CLERK (SEAL)
Lisa Appelo

By: /s/ Rhonda Causseaux
Deputy Clerk

Copies:

Jack D. Kelly
Francis H. Sheppard

APPENDIX D

SUPREME COURT OF FLORIDA

WEDNESDAY, DECEMBER 20, 1995

JACK DAVID KELLY,	**	
Appellant/Petitioner,	**	CASE NO. 87,039
v.	**	DISTRICT COURT OF APPEAL, 1ST DISTRICT
ALBERT PENSON, ETC.,	**	– NO. 94-4303
Appellee/Respondent.	**	

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed and no motion for rehearing will be entertained by the Court.

It appearing to the Court that the District Court of Appeal, First District, did not declare *invalid* a State Statute or a provision of the State Constitution, and that, therefore, it is without jurisdiction, this appeal is hereby dismissed subject to reinstatement if jurisdiction is established on proper motion *filed* within fifteen (15) days from the date of this order. See Article V, Section 3(b)(1), Florida Constitution.

A True Copy
TEST:

Sid J. White
Clerk Supreme Court

By: /s/ Betsy Hill (SEAL)
Deputy Clerk

H

cc: Hon. Jon S. Wheeler, Clerk
Hon. Dave Lang, Clerk
Hon. F. E. Steinmeyer, Judge
Mr. Jack David Kelly
Mr. Francis H. Sheppard
Ms. Lisa M. Appelo

(4)

Supreme Court, U.S.
FILED
MAY 8 1996
CLERK

No. 95-1578

In The

Supreme Court of the United States

October Term, 1995

JACK DAVID KELLY, "PRO SE,"

Petitioner,

versus

ALBERT PENSON, in his individual capacity and as a partner in the Law Firm of HILTON, HILTON, KOLK AND PENSON, P.A.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Florida

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JACK DAVID KELLY, Pro Se
3331 Summit Blvd., #87
Pensacola, FL 32503
(904) 438-4785

Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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REPLY TO LIST OF INTERESTED PARTIES

The petitioner is Jack David Kelly, individually and as a person with equity and legal title as the original sole owner of Maple Leaf Development Corporation and its original president and chairman, "pro se." See cases No. 92-327 and 95-882 of which Albert Penson, in his individual capacity and as a partner in the law firm of Hilton, Hilton, Kolk and Penson was the hired, contracted attorney and attorney firm to represent the petitioner in Second Judicial Circuit, Leon County, Florida No. 90-3378, the beginning of the above cases.

Therefore, the above would more properly describe the petitioner's list of interested parties and entities.

vs.

Albert Penson in his individual capacity and as a partner in the law firm of Hilton, Hilton, Kolk and Penson.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

The respondents/defendants in their lack of value put in the 14th amendment's right and their apparent utter disregard for the Constitutional rights of the Constitution of the United States of America in their reply to the Writ of Certiorari is saying basically that any violation of constitutional rights is insufficient to trigger jurisdiction of this honorable court and the Constitution of the United States of America and its constitutional rights of an individual citizen of the United States and all its people.

Because certainly the constitutional right of equal protection of the law by the Constitution as cited in the Writ of Certiorari is the single most important of all constitutional rights. It balances the scales of justice of all the other constitutional rights of the people of the United States of America and certainly is sufficient to establish jurisdiction of this honorable court and in fact demands jurisdiction.

Principle 168 from Article 111.2.1 provides and guarantees the petitioner and all citizens their fundamental rights of the Constitutional rights of the United States of America to insure the scales of justice is balanced, securing the right of law and equity and protection from color of law, color of title, and prejudicial biased opinions and orders, etc., etc.

There could be no more federal questions than the ones stated above.

———♦———

REPLY TO CITATION TO OPINIONS AND ORDERS ISSUED

The Supreme Court of Florida's dismissal of the Petition for Certiorari Review, reported at 666 So.2d 143 (FLA 1995) (Attached as Appendix "A") is not signed or sealed, in violation of Florida Rules of Appellate Procedure.

Rule 9.020 Definition (e)(g)

(e) ORDER. A DECISION, ORDER, JUDGMENT, DECREE or Rule of lower tribunal, excluding minutes and minute book entries.

(g) RENDITION (OF AN ORDER). AN ORDER is rendered when signed, written order is filed with the clerk of the lower tribunal. However, unless another applicable rule of procedure specifically provides to the contrary.

No such signed written order is filed with the clerk of the lower tribunal and there is no known applicable rule of procedure specifically providing to the contrary known by the petitioner.

FAILURE TO MEET TIME LIMITATION

The brief in opposition filed on May 1st is untimely filed, Pursuant of Supreme Court Rule 15.3.

Supreme Court Rule 15.3

"Any brief in opposition shall be filed within 30 days after the case is placed on the docket. . . . "

The Writ of Certiorari was received by the court March 18, 1996 and given the Civil Docket No. 95-1578

with the docketing fee paid at the same time with a certified check. The Supplemental Appendix to Petition for Writ of Certiorari was received by the court on March 29, 1996 and given the same docket number.

The Respondent's Brief in Opposition is postmarked on May 1, 1996 which is certainly beyond the 30-day time limitation.

The above constitutes proper time for civil docketing in proper chronological order.

REPLY FOR REASONS FOR DENYING THE BRIEF IN OPPOSITION

This case could present no more of a federal question than the one stated above and the continuous misrepresentation of the opposition that there are no federal questions involved is absurd.

In addition, the statement of the respondent's opposition: "does not set forth the procedural and substantive nature of this case" is erroneous. In fact the Florida state court of last resort has departed from the accepted uniform constitutional rights of judicial procedure and sanctioned such departure by the lower courts of Florida.

Therefore, for the reasons stated above the defendants/respondents' Brief in Opposition should be denied and stricken with sanctions mandating the rights of the Constitution be upheld in accordance with Supreme Court Rule 5.4.

Wherefore, the petitioner, a citizen of the United States of America asks this honorable Supreme Court of

the United States to exercise its supervisory power and reverse the judgment of the lower courts and remand the case to trial.

Respectfully submitted,

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